

"network dominance" to rest,¹³ but apparently those who wish to avoid competition can't or won't let it die. To the extent the claim of "network dominance" is supported only by rhetoric of the sort quoted above, it should be dismissed out of hand. To the extent this bogus claim is supported by what purport to be economic data and analysis, the Supplementary Economic Analysis demonstrates that it has absolutely no merit. (Supplementary Economic Analysis at 40-46). NBC wishes to add only the following brief points on the issues of network audience shares and network/affiliate relationships:¹⁴

Viewing. While it is true that the three networks combined attract more viewers in prime time than any single outlet, this is not evidence of market dominance or marketplace failure requiring corrective regulatory action.¹⁵ First, if NBC, ABC and

¹³ See, e.g., In re Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282 (1993).

¹⁴ NBC relies on the analysis in the Supplemental Economic Analysis to respond to the claim that the networks "dominate" the advertising market.

¹⁵ We note that the champions of the "network dominance" theory always aggregate the viewing shares of the three networks, as though they do not compete against each other, but disaggregate the shares of all their competitors to illustrate how tiny their viewership is by comparison. In fact, the combined shares of all cable networks or all "independent" stations is greater than the audience share of any of the original networks. Thus, for the 1994-95 season, the prime time share for basic and pay cable was 28 and the share for independent stations (including Fox, UPN and WB affiliates) was 24. The shares for NBC, CBS and ABC were 19, 18 and 20, respectively. (Nielsen Television Index).

CBS continue to attract the majority of viewers in prime time, it is because they offer the most attractive programming, not because of some anticompetitive practice or market failure that must be remedied by the Commission. To quote INTV

[S]uccess is no sin. This especially is the case where it has resulted from open competition and causes no anticompetitive barrier to more competition. (INTV Comments at 35).

INTV was referring to King World, which has been so successful in the first-run syndication business that it has captured 31% of the market -- higher than any network's share in prime time.¹⁶ But this sauce is also good for the gander. The three original networks face enormous competition from other distributors. As the recent launch of two new broadcast networks and dozens of new cable networks demonstrates, there are no barriers to new entry,¹⁷ and alternative sources of programming have the audience access required to be successful.¹⁸ If,

¹⁶ Paul Kagan Associates, TV Program Stats, September 30, 1994, p.5.

¹⁷ "[The] data suggest that there are (and were at the time of PTAR's adoption), many independent suppliers of programming for both network and nonnetwork broadcast; that the minimum efficient scale of production is low; and that there are no obvious impediments to entry and growth by new suppliers of programming." (FTC Staff Comments at 13).

¹⁸ As noted above, during the 1994-95 season, Fox was more successful than CBS in attracting the 18-49 audience demographic that is most attractive to advertisers. When UPN's "Star Trek: Voyager" premiered on January 16, 1995, it was the number one rated program for the night. (Advertising Age, January 23, 1995).

despite this competition, network programming is more successful than other types, it is "no sin."

Finally, the three original networks continue to lose audience to their competitors -- hardly an indication that they dominate television viewing. During the 1994-95 season, three network prime time viewing shares dipped to a new low of 57, representing only 50% of the viewing during the 8 - 11:00 PM period.¹⁹

Network/Affiliate Relations. Similarly, high clearances of network programming during prime time are not an indication of network "dominance," but of the efficiency of networking and the attractiveness of network programming relative to other options affiliates have.²⁰ Given the proliferation of program sources in the marketplace, stations today have a real choice between being an affiliate or an independent, and, if they choose to be affiliates, among six networks. The decision to become the affiliate of a particular network and to clear that network's

¹⁹ Since prime time viewing is characterized by multiple set viewing in many households, the number of total share points exceeds 100. Thus, to translate the three networks' audience shares into percentage of total prime time viewing, the network share points must be divided by the total share points.

²⁰ As demonstrated in the our initial Comments and the accompanying Economic Analysis, networks are not nearly as successful at obtaining clearances in other dayparts, where affiliates believe their interests are better served by programs from other sources.

programming is driven by the station's desire to present its audience with the most attractive and competitive programs. These decisions are not dictated by some "dominant" network entity.

As the FTC Staff points out, networks and their affiliates have a mutual interest in presenting programming that will be most attractive to audiences and therefore generate the most advertising revenues.²¹ While a network and its affiliates may bargain hard over the division of "economic rents" between them, they share the goal of maximizing these "rents." Thus the proposition the networks would "force" their affiliates to carry unpopular programs makes no sense. Moreover, increased competition among networks makes this type of coercion less likely than ever. (FTC Staff Comments at 18-23).

V. THE COMMISSION SHOULD NOT TAKE HALF MEASURES; PTAR SHOULD BE REPEALED IN ITS ENTIRETY. IN NO EVENT SHOULD IT BE MODIFIED TO PROVIDE REGULATORY RELIEF ONLY TO THE MAJOR HOLLYWOOD STUDIOS

The record in this proceeding clearly demonstrates that the costs of PTAR outweigh any of its putative benefits. Therefore,

²¹ The FCC Network Inquiry Special Staff came to the same conclusion 15 years ago, when there were no "emerging" broadcast networks, few cable networks, no wireless cable or DBS, and the competition the original networks faced was a fraction of what it is in 1995. (FCC Network Inquiry Special Staff Report, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, (vol. II), October 1980, p. 288).

the entire Rule should be eliminated. However, if the Commission decides only to relax PTAR, it must reject the suggestion that the competitive handcuffs be removed from everyone except the three original networks. If the access period is to be opened up so that all suppliers of syndicated programming can compete for clearance of Top 50 market affiliates, then NBC, CBS and ABC should have the opportunity to compete alongside everyone else. Both off-network programs (including those distributed by a network entity after the sunset of the fin/syn rules) and first-run programs produced by a network production entity should be allowed to compete in the syndication marketplace for clearance on affiliated stations in Access.²²

No participant in this proceeding has advanced a sound economic or policy rationale for continuing to restrict the programming activities of only the three original networks. Elimination of only the off-network provision, and not the 1991 "clarification" which included first-run syndicated programs produced by a network-owned entity within the scope of PTAR, would provide regulatory relief primarily for the few major MPAA studios who produce for three-network prime time. These companies already dominate network prime time production, the access hour and the syndication market generally, representing

²² If the Commission only relaxes PTAR at this time, the Rule should completely sunset in no more than three years.

49% of total network prime time entertainment series during the 1993-94 season,²³ 85% of affiliate Access programming,²⁴ and over 53% of the off-network and first-run syndication market.²⁵ They do not need special treatment by the government in the form of a rule that insulates them from competitive syndicated programs produced or distributed by the three networks. Allowing the network-produced and distributed programs succeed or fail in the syndication market on an equal footing would enhance both competition and diversity during the fourth hour of prime time.

Moreover, there cannot be a justification for a rule that prohibits NBC, ABC and CBS from competing for clearance of syndicated programming during their affiliates' Access period, when Fox, Paramount and Warner Brothers are free to furnish such programming not only to their own affiliates, but to the affiliates of the three original networks as well.

The arguments in support of continued PTAR restrictions that would target only the three networks are largely based on the discredited "network dominance" theory. The Coalition to Enhance Diversity ("Coalition") also argues that if networks could compete in access "the benefits from the removal of the off-

²³ Economic Analysis, Appendix E, p. 106.

²⁴ Economic Analysis, Appendix H, p. 134.

²⁵ Paul Kagan, TV Program Stats, October 31, 1994, p. 8.

network restriction would simply vanish." (Coalition Comments at 35). But the point of changing PTAR should not be to benefit only off-network programming and the large Hollywood studios that produce it. To reiterate, it is highly inappropriate for the government to impose regulations that favor one type of program and disfavor another. The point of any deregulation should be to restore competition and true local station choice. This goal cannot be fully realized if three logical competitors continue to be fenced out of the market by unnecessary and unjustified regulation.

The Coalition also argues that elimination of the so-called "network restriction" (under which it includes not only programming that is part of the network service, but programming produced or distributed by a network entity), would harm program diversity. Relying on its outside economic consultants, the Coalition argues that, as "hierarchical" organizations, the networks are likely to "squeeze out" the diversity and innovation that is characteristic of independent producers. The Coalition is also "worried" that increased vertical integration in the television industry will "foreclose unintegrated producers and deter new producers." It illustrates its point with a quote from the 1990 testimony of independent producer, Thomas Carter, at the FCC's en banc hearing on fin/syn, where he proclaimed that if a network had owned his project, "Equal Justice," it might never have been produced. (Coalition Comments at 35-39).

NBC refers the Commission to the Supplemental Economic Analysis for our principal response to the Coalition's preposterous theories about hierarchy and vertical integration (p. 51 et seq). However, we cannot resist pointing out the following: First, assuming the Coalition and its economists are correct about the effect of "hierarchical" organizations and vertical integration on diversity, then the Commission should adopt a rule that restricts television production by the Walt Disney Company, one of the Coalition's members. Surely none of the networks is more hierarchical or vertically integrated than Disney, or any of the other the other major Hollywood studios that produces programs for the networks and first-run syndication.

Second, as NBC pointed out in comments filed following Mr. Carter's appearance at the en banc fin/syn hearing: (1) It was a network (ABC) who gave him his first program development deal, which resulted in the production of "Equal Justice." (2) Soon after production of the show began, Orion, the MPAA studio that financed the show and therefore, under standard operating studio procedure, owned the copyright, felt it could no longer finance the show. At that point ABC took the program over as an in-house production.²⁶ Thus, ABC funded the development and production of

²⁶ Reply Comments of National Broadcasting Company, Inc. on Further Notice of Proposed Rulemaking, MM Docket No. 90-162, filed December 20, 1990, pp. 21-22.

"Equal Justice," and ultimately owned the show. Given these facts, it is hard to credit Mr. Carter's view that his show would have withered on the vine if a network had been involved.

VI. THE COMMISSION SHOULD NOT DELAY REPEAL OF PTAR UNTIL SOME TIME AFTER THE FIN/SYN SUNSET. THE RULE SHOULD BE ELIMINATED IMMEDIATELY.

Those commenters who would like to delay or limit competition argue that the Commission should take no action on PTAR until it can assess the effect of the sunset of the remaining fin/syn rules. In other words, the Commission should retain one outdated, counterproductive and anticompetitive rule because another outdated, counterproductive and anticompetitive rule is about to go away.

There is no reason for the Commission to conclude that the ability of the three original networks to engage in domestic syndication in November 1995 provides a reason to delay repeal of PTAR. The Commission has expressly found that before 1970, network syndicators did not favor their affiliates.²⁷ Furthermore, Fox, Paramount and Warner Brothers are major syndicators who now operate broadcast networks, and no claim has been made, much less proven, that it is bad public policy to

²⁷ Prime Time Rule, 19 RR2d 1869, 1886 (1970); See also, Tables 68 and 69, Arthur D. Little, Inc., "Television Program Production, Procurement and Syndication," Vol. II, February 18, 1966, Docket No. 12782.

allow them to continue to engage fully in both syndication and networking.

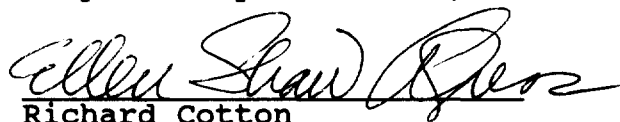
Fin/syn and PTAR are companion rules -- adopted together and for similar purposes -- which are based on the same faulty premises and are equally outdated in today's marketplace. Both force one set of competitors to subsidize others and both have operated to lessen competition, diversity and viewer welfare. Both "reflect a persistence of protectionist thinking that the Commission itself has discredited." Capital Cities/ABC v. FCC, 29 F.3d 309, 316 (7th Cir. 1994).

It has been 19 months since the Commission repealed the financial interest rule, over similar objections by essentially the same parties that "the sky would fall" if the rule was repealed. Well, the sky has not fallen; on the contrary, the marketplace has clearly become even more competitive since then. As the Court said with respect to the fin/syn rules, the Commission should not and cannot continue to delay repeal of rules "whose mismatch with the current situation in the broadcast industry becomes more evident by the day." Ibid. Just as fin/syn makes no sense in today's marketplace, neither does PTAR. Both should be eliminated.

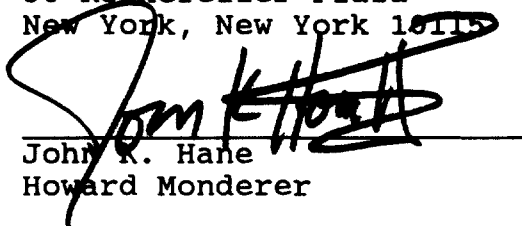
VII. CONCLUSION

Those who have been sheltered from competition by PTAR would like to see it retained. Those who fear additional competition endorse either no change or just enough deregulation to serve their narrow business interests. No sound economic or policy rationale has been offered in this proceeding to support either of these outcomes. The public interest in competition and diversity is clearly not served by a rule that protects only financially strong major market stations (most of which are now network affiliates), Hollywood studios and one dominant first-run syndicator. The record before the Commission clearly demonstrates that the costs of PTAR outweigh the limited benefits it may confer on an undeserving few.

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EXHIBIT A

Summary of Findings

I. Analysis of Top 50 "Independent" Stations Access Programming

Total Top 50 "Independent" Stations	291
Total Top 50 "General Interest" "Independent" Stations	182
Total Top 50 "Independent" Stations Broadcasting Top 5 Off-Network Programs During Access	46
Total Half Hour Segments On Top 50 "Independent" Stations During Access	238
Total Half Hour Segments Devoted To Top 5 Off-Network Programs	58

II. Analysis of 46 "Independent" Stations Broadcasting Top 5 Off-Network Programs During Access

Total VHF	10
Total UHF	36

Affiliation

FOX	20
UPN	13
WB Television	3
Total Affiliates	36
Non-Affiliates	10

Ownership of 46 Stations Broadcasting Top 5 Off-Network Programs In Access

Major Group (3 or more stations)	37
Individual/Small Group	9

Ownership of 10 Non-Affiliates Broadcasting Top 5 Off-Network Programs In Access

Major Group (3 or more stations)	10
Individual/Small Group	0

UHF station, neither affiliated nor group owned	0
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Conclusion: Not a single "independent" station in the Top 50 markets that is broadcasting a top 5 off-network program during Access is not a network affiliate and/or owned by a major group.¹

¹ Data Sources: (1) identity of Top 50 stations broadcasting top 5 off-network programs in Access - INTV Comments, App. 2; (2) identity of top 5 off-network programs - INTV Comments, App. 2 (off-Fox programs not included); (3) network affiliation information for Fox - Warren Publishing; (4) network affiliation information for UPN and WB Television - Electronic Media, January , 1995; (5) ownership information - Warren Publishing.

TOP 50 INDEPENDENT STATIONS BROADCASTING TOP 5 OFF-NETWORK PROGRAMS IN ACCESS

	<u>Market (Rank)</u>	<u>Station</u>	<u>Ch #</u>	<u>Net Aff</u>	<u>Program</u>	<u>Owner</u>
1.	Los Angeles (2)	KTLA	5	WB	Cheers	Tribune B'casting
2.	Chicago (3)	WGN	9	WB	Cheers	Tribune B'casting
		WFLD	32	FOX	Cosby	
3.	Philadelphia (4)	WGBS	57	UPN	Roseanne	Combined B'casting
4.	San Francisco (5)	KTVU	2	FOX	Cheers	Cox Enterprises
5.	Boston (6)	WSBK	38	UPN	Cheers	New World Comms
6.	Washington, DC (7)	WDCA	20	UPN	Cheers	Viacom
7.	Dallas-Ft Worth (8)	KTVT	11	IND	Full House Roseanne	Gaylord B'casting
8.	Atlanta (10)	WGNX	46	IND	Roseanne	Tribune B'casting
9.	Houston (11)	KHTV	39	IND	Roseanne Cosby	Gaylord B'casting
10.	Cleveland (13)	WOIO	19	FOX	Roseanne	Malrite Comms
11.	Seattle-Tacoma (14)	KSTW	11	IND	Cheers Roseanne	Gaylord B'casting
12.	Miami (15)	WBFS	33	IND	Full House	Combined B'casting
13.	Tampa (16)	WTOG	44	UPN	Cheers	Hubbard B'casting
14.	Pittsburgh (17)	WPGH	53	WB	Roseanne	Sinclair B'casting
15.	St. Louis (18)	KPLR	11	WB	Roseanne	Koplar Comms*
16.	Sacramento (19)	KTXL	40	FOX	Roseanne	Renaissance Comms

* = Not a major group owner (i.e., less than three stations)

	<u>Market (Rank)</u>	<u>Station</u>	<u>Ch #</u>	<u>Net Aff</u>	<u>Program</u>	<u>Owner</u>
					Cheers	
17.	Phoenix (20)	KUPT	45	UPN	Roseanne	Chris-Craft
		KNXV	15	FOX	Scripps	
18.	Denver (21)	KWGN	2	IND	Roseanne	Tribune B'casting
19.	Baltimore (22)	WBFF	45	FOX	Cheers	Sinclair B'casting
		WNUV	54	UPN	Cosby	ABRY Comms
20.	Orlando (23)	WOFL	35	FOX	Roseanne	Meredith
21.	Hartford-New Haven (24)	WTIC	61	FOX	Roseanne	Renaissance Comms
22.	San Diego (25)	KUSI	51	UPN	Roseanne	McKinnon B'casting*
23.	Portland (26)	KPTV	12	UPN	Roseanne Cheers	Chris-Craft
24.	Kansas City (28)	KSHB	41	IND	Cosby	Scripps
25.	Milwaukee (29)	WVTV	18	IND	Roseanne Full House	Gaylord B'casting
26.	Cincinnati (31)	WXIX	19	FOX	Roseanne	Malrite Comms
27.	Nashville (33)	WZTV	18	FOX	Cheers	Act III B'casting
28.	Columbus (34)	WTTE	28	FOX	Roseanne	Sinclair B'casting
29.	San Antonio (36)	KABB	29	UPN	Roseanne	Better Comm's*
		KAVU	25	IND	Cheers	Withers B'casting
30.	Grand Rapids (37)	WXMI	17	FOX	Full House Cheers	Dudley Comm's*
31.	Buffalo (38)	WUTV	29	FOX	Cheers Roseanne	Act III B'casting
32.	Norfolk (39)	WGNT	27	UPN	Roseanne	Centennial Comms*

	<u>Market (Rank)</u>	<u>Station</u>	<u>Ch #</u>	<u>Net Aff</u>	<u>Program</u>	<u>Owner</u>
33.	New Orleans (40)	WGNO WNOL	26 38	IND FOX	Cosby Cheers	Tribune B'casting Quincy Jones B'casting*
34.	Salt Lake City (41)	KJZZ KSTU	14 13	UPN FOX	Roseanne Cheers	Larry Miller Comms* Fox Television
35.	Memphis (42)	WPTY WLMT	24 30	FOX UPN	Roseanne Cosby	Clear Channel TV Chesapeake Bay Hldg*
36.	Oklahoma City (45)	KOCB	34	UPN	Cheers Roseanne	Superior Comms*
37.	Charleston-Hunt (46)	WVAH	11	FOX	Roseanne Cheers	Act III B'casting
38.	Louisville (47)	WDRB	41	FOX	Roseanne Cheers	Blade Comm's
39.	Birmingham	WTTO	21	FOX	Roseanne Cheers	Sinclair B'casting